FILED JUNE 9, 2010

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case Nos.: **05-O-02431-LMA**
	)	**(05-O-03168; 07-O-15015)**
THOMAS BREEN KIDWELL	)	
	)	**DECISION INCLUDING DISBARMENT**
Member No. 66413	)	**RECOMMENDATION AND ORDER OF**
	)	**INVOLUNTARY INACTIVE**
A Member of the State Bar.	)	**ENROLLMENT**

I. INTRODUCTION

In this contested, original disciplinary proceeding, the Office of Chief Trial Counsel of the State Bar of California (State Bar) charges Respondent **Thomas Breen Kidwell** with a total of 23 counts[1] of professional misconduct involving four separate matters. The alleged misconduct involved, among other things, violations of rules 3-110(A), 4-100(A) and 4-100(B)(3) and (4) of the Rules of Professional Conduct[2] and sections 6068, subdivisions (d) and (m), 6103 and 6106 of the Business and Professions Code.[3]

The court finds, by clear and convincing evidence, that Respondent is culpable of 17 of the 23 counts of misconduct. For the reasons stated *post*, the court recommends that Respondent be disbarred and that he be ordered to make specified restitution.

[1] The Notice of Disciplinary Charges states that there are 24 counts but there is no count 16.

[2] Future references to rules are to this source.

[3] Future references to section are to this source.

II. PERTINENT PROCEDURAL HISTORY

The State Bar filed the Notice of Disciplinary Charges (NDC) in this matter on April 30, 2009. Thereafter, Respondent filed his response to the NDC on May 28, 2009.

The trial spanned five days, concluding on January 29, 2010.

At the State Bar's request, counts 17, 18 and 20[4] in the Saiid matter are dismissed with prejudice.

The court took the matter under submission for decision on March 22, 2010. The State Bar filed its closing brief and a request for extension of time for late filing on March 26, 2010. The request for late filing is granted. Accordingly, the March 22 submission date is vacated and the matter is submitted for decision on March 26, 2010.

The State Bar was represented by Deputy Trial Counsel Treva Stewart. Respondent represented himself.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record and the evidence adduced at trial. Many of the court's findings of fact are based, in large part, on credibility determinations. After careful observation and consideration, the court found the witnesses' testimony to be generally credible, with the following exception. The court found that Respondent's testimony lacked credibility.

After carefully observing Respondent testify and after carefully considering, inter alia, Respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a whole, the court finds that much, if not most, of Respondent's testimony lacks credibility.[5] (See,

[4] These counts address alleged violations of rule 4-100(a) and section 6106.

[5] Of course, the court's rejection of much of respondent's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected

generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.)

In many instances, Respondent's testimony was not only evasive, but it was also inconsistent with the clearly more credible and reliable evidence proffered by the State Bar. In other instances, even Respondent's uncontradicted testimony lacked credibility. (See *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7 [trial court is not bound to accept as true the sworn testimony of a witness even in the absence of evidence contradicting it].)

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 18, 1975, and has been a member of the State Bar of California since that time.

B. The Nestor Matter – Case no. 05-O-02431

1. Facts

At all times pertinent to this matter, Charles Corson was the president of Nestor Insulation, Inc. (Nestor). Wilmuth Corson was the secretary and treasurer of Nestor.

Nestor was incorporated on June 28, 1968 for the primary purpose of engaging in the business of insulation contracting and to carry on as a supplier and installer of insulation.

In November 1998, Nestor was named as one of over 100 party defendants in a large asbestos-related tort litigation lawsuit. (*Borgen v. Raybestos, Inc.*, San Francisco County Superior Court, case no. 99-8578.)

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testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; see also *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

In 1998, Respondent was retained to defend Nestor in the *Borgen* lawsuit. Thereafter, in addition to the asbestos litigation, Respondent continued to provide legal services to Corson on behalf of Nestor.

On April 12, 2000, Wilmuth Corson, age 77, filed for divorce from Corson, age 79. (*Corson v. Corson*, San Francisco County Superior Court, case number 100FL 091664.) Nestor was joined as a party to the divorce proceedings. Respondent was the attorney for claimant Nestor in the divorce proceedings.

Attorney Janet Syphers represented Corson in the divorce proceedings. On December 14, 2000, by the agreement of Corson and Wilmuth Corson (the Corsons) and their counsel, Respondent, on behalf of Nestor, received $158,095.64 for the sale of a country club membership that Nestor and/or the Corsons held in La Riconada Country Club.

On April 17, 2001, the court in the divorce proceedings entered a Stipulation and Order re Country Club Proceeds and Payment of Credit Cards (4/17/01 Order). Of the proceeds from La Riconada Country Club, the 4/17/01 Order specified that Respondent "shall pay the following from his trust account": $79,000.00 (the undisputed portion of the Corsons' community property) to Syphers, $2,000.00 to the City of San Jose and $725.00 to the City of San Jose.

The April 17, 2001 Order stated that, after making these payments, Respondent should have a balance of approximately $76,275.00 which he should continue to hold in trust pending written agreement of the parties or further order of the court. Respondent was to make additional payments as ordered.

Respondent was properly served with the 4/17/01 Order and was aware of its contents.

A review of Respondent's CTA number 147001 held at Union Bank shows that Respondent made the following disbursements consistent with the 4/17/01 order: 1) on April 29,

2001, a payment of $79,000.00 to Syphers; 2) on April 25, 2001, a payment of $2,000.00 to the City of San Jose; and 3) on April 20, 2001, a payment of $725.00 to the City of San Jose.

After disbursing the $79,000, the Corsons authorized Respondent to use the remainder of the funds to pay the Corsons as Nestor's employees. The Corsons would receive salaries of $1,699.51 every month and they expected Respondent to pay the appropriate payroll taxes for the Corsons as Nestor's employees.

From the period including, but not limited to, the year 2003 through May 2004, Respondent's duties included distributing the payroll salaries from the funds he held on behalf of Nestor from the sale of La Riconada Country Club to the Corsons, and, paying state and federal payroll taxes, paying corporate fees and taxes, and insuring the submission of all quarterly tax reports.

Nestor owed the Internal Revenue Service (IRS) $870.00 in payroll taxes for each month in the year 2003. Respondent should have made monthly payments to the IRS in the sum of $870.00 for the 2003 monthly payroll taxes by each of the following dates: February 18, 2003, March 17, 2003, April 15, 2003, May 15, 2003, June 16, 2003, July 15, 2003, August 15, 2003 and September 15, 2003. Respondent failed to pay the payroll taxes for Nestor for the calendar year 2003.

As part of his duties in representing Nestor, Respondent was also responsible for providing the appropriate quarterly wage reports to the Employment Development Department (EDD) and making the appropriate quarterly payments to the EDD on behalf of Nestor. Respondent did not submit quarterly wage reports to EDD for the quarters ending March 31, 2003, June 30, 2003 and September 30, 2003. Respondent did not make the appropriate payments to EDD for 2004.

On February 16, 2004, Corson received a notice from the IRS notifying him that $1,009.18 was due to the IRS for delinquent payroll taxes.

On April 5, 2004, Corson wrote a letter to Respondent and asked Respondent if he paid these taxes. Corson wrote "Have you looked to see when and if this was sent for payroll taxes of 12/31/02?"

Corson received additional notices from the IRS, advising him of unpaid taxes for Nestor for the periods of February 2003 through December 2004.

Corson also received notices from the EDD notifying him of delinquent quarterly wage reports for three quarters of the year 2003; and delinquent payments for 2004. On June 16, 2004, the EDD sent Corson a notice that Nestor owed $507.88 in liabilities to the EDD. On December 2, 2004, the EDD sent Corson a notice that Nestor was delinquent $517.50. On February 16, 2005, the EDD sent Corson a notice that Nestor owed $521.82.

Between February 2002 and May 2004, Corson repeatedly asked Respondent if he, Respondent, had paid the appropriate payroll taxes to the IRS and the payments to EDD.

On June 28, 2004, Corson wrote a letter to Respondent. Respondent received the letter. In the letter, Corson advised that the EDD had called Corson, and the EDD had advised Corson that they did not receive the checks. Corson asked Respondent to clarify the check discrepancies.

Each time Corson inquired about the payment of the payroll taxes, Respondent assured Corson that he, Respondent, had paid the payroll taxes on behalf of Nestor.

Attorney Syphers represented Corson in the divorce proceedings.

On August 4, 2004, Syphers on behalf of Corson, asked Respondent for a full accounting of the funds Respondent held in trust, records showing tax payments, cancelled checks for tax payments, and quarterly reports.

Respondent failed to respond to Syphers letters or otherwise give her the information she requested.

On September 16, 2004 and again on November 1, 2004, Syphers sent Respondent facsimile transmission sheets where Syphers again requested that Respondent provide the information about the Nestor accounting and payment of taxes.

Respondent failed to respond to Syphers' facsimiles or otherwise give her the information she requested.

On November 4, 2004, the parties met at a settlement conference in the Corson divorce proceedings. Respondent represented to the parties that he had paid the employee payroll taxes for Nestor. Respondent said that he would provide proof that the taxes were paid.

On December 10, 2004, and again on December 29, 2004, Syphers sent Respondent facsimile transmission sheets where Syphers again requested that Respondent provide the information about the Nestor accounting and payment of taxes.

Respondent failed to respond to Syphers' facsimiles or otherwise give her the information she requested.

In November 2003, Respondent sent an accounting to Corson, purportedly accounting for Nestor funds that he held in trust.

In the accounting, Respondent indicated monthly disbursements of $870.00 to "Fed.Tax on Salaries" each month for the months of January 2003 through August 2003.

Respondent did not pay the monthly disbursements to the IRS as he indicated on his accounting.

Between July 29, 2003 and December 29, 2003, Respondent provided copies of ten checks to Corson, dated from July 2003 through December 2003. The payees noted on the

checks were either the IRS or the EDD. Respondent indicated to Corson that these checks were issued to EDD and the IRS and that Respondent had paid these checks on behalf of Nestor.

In fact, Respondent fabricated the checks he provided to Corson. Respondent did not issue the checks as he indicated nor were they negotiated by the noted payees. Respondent issued the actual checks to completely different payees, in completely different amounts for matters unrelated to Nestor. These funds were negotiated by the named payees.

Between January 2003 and August 2003, Respondent provided Corson with a list of 16 checks, which included a list of check numbers, a list of payees that corresponded with each check number, and an amount that corresponded to each check number. Respondent represented to Corson that that he issued each of these checks either to the IRS or the EDD on behalf of Nestor.

In fact, Respondent fabricated the list of checks that he provided to Corson. Respondent did not issue the checks as he indicated, nor were they negotiated by the noted payees. The actual checks, as traced to Respondent's CTA records, correspond to completely different payees, in completely different amounts.

On June 2, 2003, Respondent submitted a "Confidential Communication" to the court-appointed mediator/director of Nestor, James Cox and the counsel for the respective parties in the divorce action, Syphers and attorney Charles Morrone. Each party received Respondent's Confidential Communication.

In the Confidential Communication, Respondent included an accounting for Nestor. Respondent indicated that he had paid $4,350.00 in federal tax on salaries for the months January 2003 through May 2003 on behalf of Nestor for the Corson salaries. Respondent's representation to divorce counsel and Cox that he paid the federal tax on the Nestor salaries for January 2003 through May 2003 was false.

On May 3, 2004, Corson wrote to Respondent and terminated his services. In the letter, Corson wrote "You're fired." He also enclosed a statement signed by the Corsons directing Respondent to transfer the remaining Nestor funds [thought to be $23,534.91] held in trust by Respondent to the corporate bank account.

Respondent received the May 3, 2004 letter from Corson and did not release the funds as he was directed to do by Corson.

On May 12, 2004, Respondent wrote back to Corson. Respondent advised Corson that he could release Nestor funds only upon a court order.

In fact, the 4/17/01 Order specified that Respondent could release funds based upon the written agreement of the parties. The statement signed by the Corsons and sent to Respondent on May 4, 2004 was such a written agreement.

Respondent stated he would request a court hearing to set his fees and obtain an order for the disbursement of the funds.

Respondent did not request a court hearing in the Corson divorce proceedings to set his fees and obtain an order for the disbursement of the funds. The last court appearance in the Corson matter was the November 4, 2004 hearing in which Respondent falsely assured Cox and Syphers that he had paid the corporate employee payroll taxes for Nestor.

On February 21, 2005, Respondent released $4,124.92 to each of the Corsons. When he disbursed the funds, Respondent provided an accounting. In his accounting, Respondent indicated that he had $19,924.84 in Nestor funds, and that he had given himself $11,675.00 in attorney's fees. On his prior accounting, Respondent indicated that he had disbursed to himself $9,350.00 in attorney's fees.

On June 30, 2003, Respondent dated a bill to Corson for 12.95 hours at the hourly rate of $225.00 per hour for services performed commencing in November, 1998 and concluding in December 2002.

On September 23, 2004, Respondent dated a bill to Corson for 46.7 hours at the rate of $250.00 per hour, for services performed commencing on October 4, 2000 and concluding on September 23, 2004, for a total amount of $11,675.00.

Respondent did not provide these billing statements to Corson at or near the time of the date on them. As of May 3, 2004, Corson was requesting an itemized statement for the charges and work performed [referring to the $9,350.00 that Respondent had placed on the January 1, 2004, accounting to the court].

The parties did not have a written fee agreement.

In Respondent's letter dated May 12, 2004, responding to Corson's letter of May 3, 2004, Respondent stated "Finally, the only reason that you have funds left in the trust account is that I have not charged Nestor for most of the time I have spent on your case. As a person "non gratis" [*sic*] I am retracting that courtesy and will seek compensation from the Court for all time spent on Nestor's matters over the past four years." Respondent removed those funds from his CTA.

Respondent did not have authorization from Corson or from the court to remove funds from the funds he held in his CTA on behalf of Nestor to pay his attorneys fees.

Corson disputed Respondent's attorney's fees. Respondent charged two different hourly rates.

Respondent originally received $158,095.64 in funds from Nestor from the sale of La Riconada Country Club membership. Pursuant to the agreement of the parties to the Corson divorce, Respondent was to hold these funds in his CTA.

The 4/17/01 Order specified that Respondent "shall pay the following from his trust account." Thereby, the court acknowledged the stipulation of the parties and affirmed the responsibility of Respondent to maintain the funds in his CTA. The 4/17/01 Order then specified that Respondent make payment of $79,000.00 to Syphers, $2,000.00 to the City of San Jose and $725.00 to the City of San Jose.

The 4/17/01 Order stated that, after making these payments, Respondent should have a balance of approximately $76,275.00 which he should continue to hold in trust pending written agreement of the parties or further order of the Court.

A review of Respondent's CTA Number 147001 account held at Union Bank shows that Respondent made the following disbursements consistent with the 4/17/01 order: 1) on April 24, 2001 a payment of $79,000.00 to Syphers; 2) on April 25, 2001 a payment of $2,000.00 to City of San Jose; and 3) on April 20, 2001 a payment of $725.00 to City of San Jose.

Thereafter, on April 30, 2001, Respondent had a CTA balance of $194,570.86, which included $76,275.00 of Nestor funds.

On June 2, 2003, Respondent wrote a "Confidential Communication" to Cox, Syphers and Morrone. In his letter, Respondent advised the court that the balance in the Nestor client trust account was $73,756.49 as of December 31, 2002.

In fact, Respondent's CTA showed a balance of $2,656.63 on December 31, 2002.

Respondent failed to maintain $73,618.37 (the difference between $76,275.00 and $2,656.63) in Nestor funds in his CTA.

By failing to release the funds to the Corsons, despite the signed agreement by the Corsons that he do so, Respondent violated the 4/17/01 Order of the court, which directed him to hold the funds until further order of the court or agreement of the Corson parties.

When Respondent removed the $73,618.37 in Nestor funds from his CTA, he diverted the funds to matters other than on behalf of Nestor. The Corsons were paid from funds other than Nestor's $73,628.37.

Respondent gave Corson various accountings over the period of his representation of Nestor. He gave Corson accountings on August 8, 2002, February 27, 2003, June 2, 2003, August 31, 2003 and January 1, 2004 (the Nestor Accountings).

Each of the Nestor Accountings was false because they each identified that payments were made for taxes, when, in fact, Respondent did not make the payments for taxes as indicated.

Also, the Nestor Accountings were false because they did not accurately represent the amount of funds that Respondent held in trust on behalf of Nestor. In fact, Respondent had misappropriated the bulk of the Nestor funds ($73,618.37) by December 31, 2002.

On June 3, 2003, Respondent misrepresented to the court appointed-director Cox and to Syphers and Morrone that he had $73,756.49 in Nestor funds, when, in fact, he had, at most, $2,656.63 in Nestor funds.

In another accounting, Respondent specified that he had a balance of $36,400.36 in Nestor funds on September 1, 2003. In fact, on September 1, 2003, Respondent had a balance of between $3,672.76 (August 30, 2003) and $1,973.25 (September 2, 2003).[6]

2. Legal Conclusions

a. <u>Count 1 - Rule 3-110(A) (Competence)</u>

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

[6] The court did not find it believable that respondent moved funds back and forth between accounts. The evidence did not corroborate that contention.

By failing to pay the payroll taxes of Nestor; by failing to file the quarterly wage reports and make the appropriate payments to the EDD, Respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count 2 - Section 6068, subd. (m) (Failure to Communicate)

Section 6068, subdivision (m) requires an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By failing to give Corson and Syphers, accurate information that he, in fact, did not pay the employee taxes for Nestor; and by failing to respond to Syphers numerous letters and facsimiles requesting information about the payment of the payroll taxes, Respondent did not respond promptly to his client's reasonable status inquiries in wilful violation of section 6068, subdivision (m).

c. Count 3 - Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that Respondent violated section 6106 by fabricating checks and providing them to Corson as proof that he paid the employee taxes and EDD when, in fact, he did not; by fabricating a list of checks and providing them to Corson as proof that he paid the employee taxes and EDD when, in fact, he did not; and by representing to Corson, Cox, Syphers and Morrone that he had paid the federal tax on salaries when, in fact, he

did not.[7] Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

d. Count 4 - Rule 4-100(B)(4) (Failure to Promptly Pay)

Rule 4-100(B)(4) requires that an attorney promptly pay or deliver, as requested by the client, any funds, securities or other properties in the possession of the attorney which the client is entitled to receive.

By delaying payment for nine months, from May 2004 when Corson directed Respondent to disburse all remaining Nestor funds to him until February 21, 2005, Respondent failed to promptly pay funds, as requested by the client, which the client is entitled to receive and wilfully violated rule 4-100(B)(4).

e. Count 5 - Rule 4-100(A)(2)(Withdrawing Disputed Client Funds)

Rule 4-100(A)(2) provides that entrusted funds belonging in part to the client and in part presently or potentially to the attorney or law firm, the portion belonging to the latter must be withdrawn at the earliest reasonable time after the attorney's or firm's interest becomes fixed. However, when the right of the attorney or firm to receive a portion of trust funds is disputed by a client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

There is clear and convincing evidence that Respondent wilfully violated rule 4-100(A)(2) by allocating $9,350.00 and $11,675.00 from his CTA without the approval of the Corsons or the court.

[7] Respondent's claim that fabricating the checks was just a means of keeping a record of what would be owed to the IRS is not credible. The only purpose for fabricating the checks was to mislead.

f. Count 6 - Section 6103 (Violation of Court Order)

In relevant part, section 6103 makes it a cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him to do or to forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear.

By not abiding by the terms of the 4/17/01 Order, Respondent wilfully disobeyed a court order in wilful violation of section 6103.

g. Count 7 - Rule 4-100(A)(Not Maintaining Client Funds in Trust Account)

Rule 4-100(A) requires, in relevant part, that an attorney place all funds held for the benefit of clients, including advances for costs and expenses, in a client trust account. There is clear and convincing evidence that Respondent wilfully violated rule 4-100(A) by not maintaining $73,618.37 of Nestor's funds in the trust account.[8]

h. Counts 8 & 9 - Section 6106 (Moral Turpitude)

There is clear and convincing evidence that Respondent violated section 6106 by diverting $73,628.37 of Nestor funds to matters other than for Nestor; and by misrepresenting to Cox, Morrone and Syphers the amount of funds he held in trust on behalf of Nestor on June 2, 2003; and by misrepresenting to Syphers and/or Corson the amount he held in trust on September 1, 2003. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

i. Count 10 - Rule 4-100(B)(3) (Failure to Account)

Rule 4-100(B)(3) requires, in relevant part, that an attorney maintain complete records of all client funds, securities or other property coming into the attorney's or law firm's possession

[8] Respondent is not credible. Moreover, there is not corroborating evidence that he actually put the funds in an account that he said he used to hold trust funds when he acted as trustee in "Starker" real estate exchanges.

and render appropriate accounts to the clients regarding them. The attorney is to preserve such records for no less than five years after final appropriate distribution of the funds or property.

By not providing Corson with an accurate accounting of Nestor funds, Respondent wilfully violated rule 4-100(B)(3).

C. The Walker Matter – Case no. 05-O-03168

Respondent represented Donald and Carol Walker in pending litigation regarding the dissolution of a partnership and the allocation of its assets. (*Walker v. Oldham*, Santa Clara County Superior Court, case no. 1-03-CV-816347.)

On June 19, 2003, Respondent received $118,761.92 in funds representing 40% of the sale proceeds of a partnership asset, a duplex. He deposited these funds into his CTA.

As noted in Respondent's trial brief filed September 17, 2004, Respondent was to hold these funds in his CTA pending the resolution of *Walker v. Oldham*.

On August 31, 2004, the balance in Respondent's CTA dropped to -$84.84.

Between June 20, 2003 and August 31, 2004, Respondent spent the Walkers' $118,761.92 on matters unrelated to them.

On October 13, 2004, the court in the Walker matter issued a Statement of Decision finding in favor of the Walkers and directed Respondent to prepare a judgment in conformity therewith.

In November 2004, Respondent prepared and submitted an Amended Statement of Decision to the court which stated at page three that "Counsel for the Walkers holds $118,761.92 in his trust account from the sale proceeds …." This statement was false. Respondent misappropriated all Walker funds on or before August 30, 2004. On November 30, 2004, Respondent had $43,429.99 in his CTA, all from matters unrelated to the Walkers. The court adopted and signed the Amended Statement of Decision on November 30, 2004.

Respondent received a check for $49,292.14 from Stephen Oliver, the opposing counsel in the Walker matter and deposited $48,292.14 into his CTA. This amount represented the equalizing payment ordered by the court pursuant to the Judgment After Trial by Court dated November 30, 2004. These funds belonged to the Walkers. Respondent was served with a copy of the November 30, 2004 Judgment After Trial by Court and was aware of it. Accordingly, the court ordered Respondent to disburse the $118,761.92 he held in trust for the Walkers and ordered the equalizing payment for a total payment to the Walkers of $172,054.06.

Respondent spent most of the $48,292.14 on matters unrelated to the Walkers. As of February 28, 2005, the balance in his CTA was $8,883.19.

On March 31, 2005, Respondent paid the Walkers the sum of $118,761.92. On April 7, 2005, Respondent paid the Walkers $34,984.64. The source of the funds was not the funds Respondent received on behalf of the Walkers.

Respondent failed to maintain in trust $172,054.06 of the Walkers' funds.

a. Count 11 - Section 6106 (Moral Turpitude)

There is clear and convincing evidence that Respondent violated section 6106 by misappropriating $159,170.87[9] of the Walkers' funds. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

b. Count 12 - Rule 4-100(A)(Not Maintaining Client Funds in Trust Account)

There is clear and convincing evidence that Respondent wilfully violated rule 4-100(A) by, as Respondent admitted, not maintaining $172,054.06 of the Walkers' funds in the trust account.

[9] ($48,292.14 - $8,883.19) + $118,761.92 = $158,170.87.

c. Count 13 - Section 6068, subd. (d) (Employing Means Inconsistent with Truth)

Section 6068, subdivision (d) requires an attorney from employing, for the purpose of maintaining the causes confided to him or her, those means only as are consistent with the truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

There is clear and convincing evidence that Respondent wilfully violated section 6068, subdivision (d). By preparing and submitting to the court an Amended Statement of Decision with a false statement regarding his retention of the Walkers' funds in his CTA, he sought to mislead a judicial officer by an artifice or false statement of fact or law.

D. The Rabinovich/Masshadiam Matter – Case no. 05-O-03168

In September 2005, Respondent represented Marianna Rabinovich in her divorce proceedings. (*Rabinovich v. Mashhadiam*, Santa Clara County Superior Court, case no. 05-FL-125033.)

On September 23, 2005, Rabinovich paid Respondent the sum of $1,282.80 which he deposited in his CTA.

On September 29, 2005, Tal J. Mashhadiam paid Respondent $2,565.59 which he deposited in his CTA.

The funds from Rabinovich and Mashhadiam which Respondent deposited in his CTA in September 2005 totaled $3,848.39. The funds were a partial payment of the December 2005 tax bill of $4,850.34 on the marital home. Respondent paid the taxes on the Rabinovich/Mashhadiam residence on the day they were due, December 10, 2005.

Respondent should have maintained the $3,848.39 that Rabinovich and Mashhadiam gave him in the CTA between September 23 & 29, 2005 and December 10, 2005, a period of

approximately two months. However, Respondent disbursed all but $118.92 of their funds to matters other than on their behalf. On September 30, 2005, the CTA balance was $2,222.92.

Respondent made the following disbursements to himself from the CTA during this time period: 1) on October 10, 2005, $1,000.00; 2) on October 12, 2005, $1,000.00; 3) on October 24, 2005, $1,500.00; and 4) on October 26, 2005, $3,100.00.

a. Count 14 - Section 6106 (Moral Turpitude)

There is clear and convincing evidence that Respondent violated section 6106 by misappropriating $3,729.47[10] of the Rabinovich/Mashhadiam funds. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

b. Count 12 - Rule 4-100(A)(Not Maintaining Client Funds in Trust Account)

There is clear and convincing evidence that Respondent wilfully violated rule 4-100(A) by not maintaining the Rabinovich/Mashhadiam funds in the trust account.

E. The Saiid Matter – Case no. 07-O-15015

On May 17, 2005, Mahnaz Ghazi Saiid also known as Ghazisaiid (Saiid) retained Respondent to represent her in two personal injury matters, *Barna* and *DeGroot*. In the *Barna* matter, Saiid was bitten by a neighbor's dog. The *DeGroot* case involved an automobile accident in a shopping mall parking lot that was under construction.

The parties signed a fee agreement dated May 14, 2005 for an "accident which occurred on or about 1/4/05" for a contingency fee, 33-1/3% of any settlement prior to filing suit, and 40% of any settlement after filing suit. The fee agreement specified that "any recovery received by the attorney on behalf of the undersigned shall be paid over to the undersigned after deducting fees and costs."

[10] $3,848.39 - $118.92 = $3,729.47.

The parties signed a fee agreement dated May 17, 2005 for an "accident which occurred on 5/13/05" for the same contingency fee terms as the May 14, 2005 fee agreement.

In September 2006, Respondent successfully resolved the *Barna* lawsuit for $7,000.00. (*Mahnaz Ghazi Saiid v. Razvan Barna, et al*., Contra Costa County Superior Court, case no. CIVMSCO5-2410.)

The first three payments in the *Barna* matter were made to Respondent, who endorsed the checks and forwarded them to Saiid. Thereafter, upon agreement of the parties, all subsequent payments were made directly to Saiid. Respondent did not retain any of the *Barna* settlement funds.

Respondent billed Saiid for $2,333.10, representing his claim for attorney's fees in the *Barna* matter, 33-1/3% of the gross settlement proceeds, which Saiid paid on September 29, 2006. After paying Respondent the $2,333.10, Saiid thought the *Barna* matter was resolved.

The *DeGroot* matter was settled at mediation on January 12, 2007 for $7,500. (*Mahnaz Ghazi Said v. Michael Albert DeGroot, et al.*, Contra Costa County Superior Court, case no. WS05-3231.)

On February 15, 2007, Depositor's Insurance Company issued a check but held the funds awaiting the proper releases from Respondent.

The settlement agreement executed by the parties required that Respondent prepare and file a good faith settlement motion and that payment was to be made within 14 days of the issuance of the order on said motion.

Thereafter, between March 1, 2007 and April 30, 2007, Saiid, and/or her daughter, Sherry Azadeh (who assisted Saiid throughout the case) telephoned Respondent, seeking information as to the status of their case and the settlement proceeds. Saiid or her daughter called Respondent numerous times over the course of two months and each time left a message asking for a return

call. Although Respondent received the telephone messages, he did not respond or otherwise apprize Saiid of the status of her case.

In mid-May, 2007, respondent completed the settlement of the *DeGroot* matter.

On May 10, 2007, Saiid wrote a letter to Respondent requesting copies of all documents in the *DeGroot* matter to be faxed to her no later than May 14, 2007.

On May 17, 2007, Respondent replied to the May 10, 2007 letter by enclosing an accounting of the costs in the *Barna* matter. By Respondent's calculations, after crediting the $2,333.10 he received in September 2006, Saiid still owed Respondent $2,184.38 in additional fees and costs in the *Barna* matter. Respondent requested that Saiid sign the bottom of the letter acknowledging his right to his accounting of the costs in the *Barna* matter.

On May 20, 2007, Saiid wrote and Respondent received a letter advising him that she thought the prior payment that she made in September 2007 was payment in full on the *Barna* case and that there was no balance due. Respondent and Saiid have a fee dispute as to whether Saiid owes Respondent anything additional on the *Barna* matter.

On June 4, 2007, Respondent wrote and Saiid received a letter advising her that he was claiming $3,427.92 in attorney's fees and costs against the $7,500.00 recovery in the *DeGroot* matter. Respondent again addressed his claim for reimbursement of costs in the *Barna* matter.

On June 11, 2007, Saiid wrote and Respondent received a letter again disputing his claim for additional payment in the *Barna* matter.

On July 6, 2007, Saiid signed the release in the *DeGroot* matter.

On July 20, 2007, Respondent received the $7,500.00 in the *DeGroot* settlement funds. According to Respondent's fee agreements, he had authority to endorse the settlement check on behalf of his client.

On July 24, 2007, Respondent wrote a letter to Saiid indicating that he would withdraw $1,000 from the proceeds of the *DeGroot* matter to pay himself for the costs he incurred in the *Barna* matter. Respondent's accounting showed $1,090.41 due to Saiid. As of the time of trial, Respondent has not paid Saiid the undisputed portion of her settlement in the sum of $1,091.41.

On July 28, 2007, Saiid wrote and Respondent received a letter advising him that she contested his proposed distribution of the settlement proceeds and payment to himself of $1,090.41 as reimbursement of costs in the *Barna* matter. Saiid advised Respondent that she thought the $2,333.10 payment that she made to him in September 2006 resolved all outstanding fee issues in the *Barna* matter. Saiid requested proof of all amounts that Respondent was billing her for.

Respondent did not respond to Saiid's letter or otherwise provide her an accounting of the settlement funds and the invoices she requested.

On October 1, 2007, Saiid sent and Respondent received a certified letter again contesting Respondent's proposed distribution of the settlement funds. She again requested "proof of the amount you are billing me for." Although Respondent received this letter, he did not respond.

Respondent has not distributed any of the *DeGroot* settlement funds to Saiid.

a. Count 19[11] - Rule 4-100(B)(4) (Failure to Promptly Pay)

Rule 4-100(B)(4) requires that an attorney promptly pay or deliver, as requested by the client, any funds, securities or other properties in the possession of the attorney which the client is entitled to receive.

[11] As previously noted, there is no count 16 in the NDC and counts 17, 18 and 20 have been dismissed with prejudice at the State Bar's request.

By not paying Said at least the $1,090.41, the undisputed amount of the *DeGroot* settlement, since July 2007, Respondent failed to promptly pay funds, as requested by the client, which the client is entitled to receive and wilfully violated rule 4-100(B)(4).

b. Count 21 - Section 6068, subd. (m) (Failure to Communicate)

By not responding to numerous calls between March 1 and April 30, 2007, and by not providing a copy of the *DeGroot*, documents as requested on May 10 and October 1, 2007, Respondent did not respond promptly to Saiid's reasonable status inquiries in wilful violation of section 6068, subdivision (m).

c. Count 22 - Section 6106 (Moral Turpitude)

There is not clear and convincing evidence that Respondent violated section 6106 by making misrepresentations to the State Bar about holding *DeGroot* settlement funds in a CTA. He presented evidence of another CTA and the funds may have been there.

d. Count 23 - Rule 4-100(A)(2) (Withdrawing Disputed Funds)

There is not clear and convincing evidence that Respondent wilfully violated rule 4-100(A)(2) by not maintaining *DeGroot* settlement funds in a CTA. He presented evidence of another CTA and the funds may have been there.

e. Count 24 - Rule 3-110(A) (Competence)

There is not clear and convincing evidence that Respondent was not completing the *DeGroot* settlement between February and May 2007 in wilful violation of rule 3-110(A).

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[12] std. 1.2(e).)

[12]All further references to standard(s) or std. are to this source.

Respondent's blemish-free discipline record since 1975 until the commencement of the misconduct herein is a significant mitigating factor. (Std. 1.2(e)(i).)

Respondent's pro bono work merits mitigation credit. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729.) He has been on the board of directors and served as corporate secretary for the public radio station in San Jose, KKUP, for many years.

B. Aggravation

It is the State Bar's burden to establish aggravating circumstances by clear and convincing evidence. (Std 1.2(b).) The court finds three factors in aggravation.

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) For example, Saiid has not been paid the undisputed portion of her settlement funds since July 2007, approximately 2-1/2 years at the time of trial.

In relevant part, standard 1.2(b)(iii) makes consideration as an aggravating circumstance whether respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward trust funds or trust property. In the instant case, Respondent has not accounted to his clients regarding their entrusted funds, either due to inability to do so because of haphazard accounting or due to refusal to do so cover up his misdeeds. Saiid requested an accounting and never received one.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) He shows no remorse. For example, he continues to maintain that fabricating checks in the Corson matter was a means of keeping a record of what would be owed to the IRS. He attributes the misconduct in the Corson matter at least, in part, to Corson's poor health advanced age.[13]

[13] The court found Corson to be a credible and reliable witness.

V. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) Discipline is progressive; however, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.7(c).)

Standards 2.2(a) and (b), 2.3, 2.4(b) and 2.6 apply in this matter. The most severe sanction is found at standard 2.2(a) which recommends disbarment for wilful misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case the minimum discipline recommended is one year actual suspension. The one-year "minimum discipline" set forth in the standard "is not faithful to the teachings of [the Supreme] court's decisions" and "should be regarded as a guideline, not an inflexible mandate." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.)

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-

defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable of misappropriating approximately $235,518.71.[14] In addition, he was been found culpable of violating rules 3-110(A), 4-100(A) and 4-100(B)(3) and (4) and sections 6068, subdivisions (d) and (m), 6103 and 6106. In mitigation, the court considered the absence of a prior disciplinary record and respondent's public service to KKUP. In aggravation, the court considered multiple acts of misconduct, client harm and lack of remorse.

The State Bar recommends disbarment. The court agrees.

Lesser discipline than disbarment is not warranted because the amount misappropriated is not insignificantly small and the most compelling mitigating circumstances do not clearly predominate. (Std. 2.2(a).) The serious and unexplained nature of the misconduct, the lack of participation in these proceedings as well as the self-interest underlying Respondent's actions suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by Respondent. Accordingly, the court so recommends.

VI. RECOMMENDED DISCIPLINE

The court recommends that Respondent **Thomas B. Kidwell**, State Bar Number 66413, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

[14] $73,618.37 (Nestor); $158,170.87 (Walker); and $3,729.47 (Rabinovich/Mashhadiam).

It is recommended that respondent make restitution to the following person within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291):

1. to Mahnaz Ghazi Saiid also known as Ghazisaiid in the amount of $1,090.41 plus 10% interest per annum from July 24, 2007 (or to the Client Security Fund to the extent of any payment from the fund to Mahnaz Ghazi Saiid also known as Ghazisaiid, plus interest and costs, in accordance with Business and Professions Code section 6140.5).

Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

The court recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.[15]

VII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that Respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail. (Rules Proc. of State Bar, rule 220(c).)

VIII. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business

[15] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: March _____, 2011

LUCY ARMENDARIZ
Judge of the State Bar Court